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No. 78-115

In the Supreme Court of the United States

OCTOBER TERM, 1978

INLAND OIL & TRANSPORT CO., PETITIONER

v.

BROCK ADAMS, SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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1. Petitioner challenges the Coast Guard's inspection and certification of four barges to be used for the transportation of combustible liquids on the inland waterways of the United States. The district court dismissed petitioner's lawsuit for lack of jurisdiction and standing (Pet. App. A-1). The court of appeals affirmed, holding the case moot (Pet. App. A-2 to A-13; 575 F. 2d 184).

The court of appeals' opinion sets forth the factual and procedural background of this case (Pet. App. A-2 to A-10). Petitioner contracted to buy four barges from Dravo Corporation. One of the conditions of the contract was that the barges be inspected for safety defects, and

certified, by the Coast Guard as required by federal law. See 46 U.S.C. 391; 46 U.S.C. (Supp. V) 391a.[1] The Coast Guard inspected and certified the barges. Petitioner—apparently seeking to avoid its contractual obligation to accept the barges once they had been certified—was dissatisfied with the Coast Guard's inspection procedures and the resulting certification. After exhausting available administrative remedies within the Coast Guard, petitioner filed this suit. While the action was pending, petitioner rejected delivery of the four barges. Dravo then sold the barges to third parties and instituted a breach of contract action against petitioner in the United States District Court for the Western District of Pennsylvania. That case is pending.

The court of appeals held that the district court had jurisdiction under 28 U.S.C. 1331, but that when petitioner rejected delivery of the barges and they were sold to third parties, petitioner's claim against the Coast Guard became moot because petitioner had lost a direct stake in the adequacy of the Coast Guard's inspection procedures (Pet. App. A-10 to A-13). The court stated (Pet. App. A-11):

> When that sale took place, [petitioner's] controversy with the federal defendants ceased to exist from a practical standpoint, and [petitioner's] controversy with Dravo is pending in the federal court in Pennsylvania.

2. Petitioner's only contention here is that the court of appeals erred in concluding that petitioner no longer has a sufficient stake in the outcome to maintain its action against the Coast Guard (Pet. 5-8). Petitioner argues that it does have a sufficient stake in the outcome because "the

[1]These statutory provisions are reproduced at Pet. App. A-25 to A-31.

operation of the barges creates a substantial risk of harm to [petitioner] in the form of an explosion or cargo spill" (Pet. 5).[2] The court of appeals' rejection of that claim is correct, and in any event the case involves only the application of settled principles to particular facts. It does not warrant this Court's review.

As the court of appeals held, "the possibilities put forward by the [petitioner] are too indirect, remote and conjectural to defeat the claim of mootness" (Pet. App. 12a). Petitioner does not contend that the barges have been shown currently to contain defects; it asserts only that there may be defects that the Coast Guard failed to discover (see Pet. 3). Thus, petitioner could not suffer actual injury unless its vessels or personnel (1) come into contact with the Dravo barges somewhere on the vast inland waterway system, (2) at a time when the barges are loaded with dangerous cargo, (3) that is likely to explode or leak, (4) because of defects in the barges, (5) that the Coast Guard should have discovered during its inspection or in periodic future inspections and (6) that would have been discovered under different inspection procedures. Such a chain of speculation does not satisfy this Court's requirement of standing to sue. This Court repeatedly has held that a plaintiff must demonstrate "distinct and palpable injury" to himself, and a "fairly traceable" causal connection between the claimed injury and the challenged conduct. See, *e.g.*, *Duke Power Co.* v. *Carolina*

[2]Petitioner may have a stake in the outcome of this action in the sense that a determination that the Coast Guard's inspection was inadequate may assist it in defending against Dravo's breach of contract action in Pennsylvania. But, as the court of appeals noted, that is not a stake that gives substance to petitioner's lawsuit against the Coast Guard. If petitioner's real interest in the matter relates to its litigation with Dravo, the issues should be resolved in that litigation, not in a separate action against the Coast Guard.

Environmental Study Group, Inc., No. 77-262, decided June 26, 1978, slip op. 11; *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26; *Warth* v. *Seldin*, 422 U.S. 490. Petitioner's showing of harm as a river user fails to meet this standard.

Petitioner's reliance (Pet. 6-7) on *United States* v. *SCRAP*, 412 U.S. 669, is unwarranted. As this Court explained in *Simon* v. *Eastern Kentucky Welfare Rights Organization, supra*, 426 U.S. at 45 n. 25, *SCRAP* involved allegations of specific and perceptible harm that would befall the plaintiffs as a result of the challenged agency actions, and those allegations were sufficient to withstand a motion to dismiss although they might not have survived a motion for summary judgment. 412 U.S. at 689 and n. 15. In finding that the allegations were sufficient to support standing, the Court in *SCRAP* emphasized that "pleadings must be more than an ingenious academic exercise in the conceivable," and that a "plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by agency action." 412 U.S. at 688-689. In this case, in contrast, plaintiff's claim of possible injury amounts to little more than an ingenious exercise in the conceivable. And, as the Court reaffirmed in *Simon*, 426 U.S. at 44, "unadorned speculation will not suffice to invoke the federal judicial power."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

SEPTEMBER 1978.

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